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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 154

LUCILLE MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

Respondent Has Misstated the Facts Relevant to the Violation of Petitioner's Constitutional Rights.

In its brief, the State of California devotes 45 pages to stating the facts that it deems "material to the questions presented. . . ."[1] It is not until page 41 that anything

[1] Rule 40, 2(e) Supreme Court of the United States, Revised Rules. The State recites every last detail of its case at trial, not once, but twice; the first time in its forty page statement of facts, and then again throughout its argument section. Nowhere does the State demonstrate the relevance of this "burdensome" and "immaterial" matter. See *Id.* at Rule 40, 5.

of relevance appears. And many of the statements from that point on are simply untrue; indeed, they are specifically contradicted by the transcript, the findings of the California District Court of Appeals, and, on some occasions, by other portions of the State's own brief.

The State asserts, for example, that the undercover agent, Peggy Fisk "was specifically instructed only to listen to Petitioner" (Respondent's brief at pages 41, 66). Yet Miss Fisk herself testified that she was instructed to start a conversation with Petitioner by deliberately lying about an incriminating conversation she allegedly overheard (R. 1107). Nor was that the only occasion on which Peggy Fisk, acting under specific instructions, commenced the discussion (see Petitioner's brief at pages 14-15). Indeed, the State—at another point in its brief—seems to concede that the conduct of the undercover agent, acting under instructions from the sheriff and police, went beyond "only" listening. On page 110, the State says:

> "The improper conduct of the undercover agent which took place after she had been placed in the jail all at the instigation of the sheriff has not been shown on this record to have been within the knowledge of the district attorney."

The State thus seems again to be ~~concerned~~ conceding—as it earlier did in its letter to the Clerk of this Court dated July 10, 1967—that the agent and the sheriff acted in an unconstitutional manner when Peggy, under specific instructions, began conversations with Petitioner by quoting what the State gingerly refers to as "fictitious conversations" (Respondent's brief at page 67). This concession would appear to be fatal to the State's position as stated in its own brief. The State argues that:

> "'as the law stood at the time Peggy Fisk was placed in Petitioner's jail cell the sheriff had sufficient grounds for a good faith belief that he had a right to place an undercover agent in that jail cell for the purpose of overhearing Petitioner's statements *provided no attempt was made on the part of the undercover agent to elicit statements from Petitioner.*"[2] (Emphasis added.)

Yet, as the State conceded, its own proviso was not met: an attempt *was made* on the part of the undercover agent to elicit statements from Petitioner.

The State then seems to shift grounds and argue something like this: yes we concede that such an attempt was made; but the record does not clearly demonstrate that it succeeded. The State puts it this way:

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[2] In arriving at its formulation of "the law" as it "stood at the time" of the Fisk incident, the State relies on the most incredible legal metaphysics. It faults Petitioner's legal analysis because:

> ". . . she has attempted to combine the necessary requisites for the applicability of the *Massiah* and *Escobedo* decisions. To get around the requirement of an accusatory pleading having been filed as to the *Massiah* rule Petitioner relies on *Escobedo*. To avoid the requirement in *Escobedo* that there be a process of interrogation and a denial of a requested opportunity to consult with a lawyer, Petitioner relies upon the indirect and surreptitious interrogation in *Massiah*. . . ." (Respondent's brief at page 61)

Without explaining why, the State insists that Petitioner "must claim under *Massiah* or *Escobedo*. She has no federal claim under combination of the two cases because of the January, 1965 date of trial," *Ibid.*, despite the fact that *both* these cases were decided prior to Petitioner's trial. Such a static view of where "the law stood" at any particular time—which does not even permit a combining of previously announced precedents—would encourage police and prosecutors to apply existing restrictions in the most grudging and artificial manner. This view of prospectivity makes little sense and does a real disservice to this Court's decision in *Johnson* v. *New Jersey*, 384 U.S. 719.

> "This particular conduct by the undercover agent was not proper, however, the record does not show any relationship between this improper conduct and the particular statements of Petitioner that were introduced into evidence."[3]

Common sense requires the conclusion, which any fair reading of the record strongly suggests, that the statements introduced at Petitioner's trial were the fruits of a process of carefully prepared and well executed statements designed to provoke responses. Even if the record were totally silent on this issue—which it is not—such silence would not inure to the benefit of the State. Surely, the "authorities have the burden of showing that their evidence is not tainted" by their concededly unconstitutional activity. *Cf. Murphy* v. *Waterfront Commission,* 378 U.S. 52, 79 at n. 18. The State has not even attempted to meet its burden here. Accordingly, this Court should assume what common sense requires and the record suggests: that the statements in-

[3] As support for this speculative assertion the State miscites the California District Court of Appeals as follows: "It was this conduct which the District Court of Appeal condemned but found that it had not injured. Petitioner. *People* v. *Miller, supra,* 245 Cal. App. 2d 112, 144. This is true because no product of this improper conduct was introduced into evidence." This creates the mistaken impression that the District Court of Appeal found that Peggy's "indefensible" conduct did not injure Petitioner *because* it did not cause her to talk. That Court made no such finding. It simply said that the statements which *were induced* from Petitioner at her trial did not injure her because they were not prejudicial. Indeed, at another point in its brief, the State seems to concede that the District Court of Appeal found that Peggy's Petitioner's statements resulted from the State's unconstitutional activities. In describing the case at bar, the State says the following on pages 114-115:

> "The District Court of Appeal held that the jail cell statements of Petitioner were *unconstitutionally obtained* under *Dorado.*" (Emphasis added).

troduced against Petitioner at her trial were the fruits of the concededly unlawful activity of the sheriff and the undercover agent.[4]

II.

Respondent Is Wrong in Suggesting That Arguments in Favor of "Prospective Overruling" Are Applicable as "Harmless Error".

Respondent argues that the "same considerations" that moved this Court to apply certain constitutional rules prospectively only, "should persuade this Court to hold that a harmless error is applicable" to the introduction of unconstitutionally obtained admissions (Respondent's brief at page 101). It suggests that the arguments which support "prospective application of . . . constitutional criminal rules [are] equally sound in support of the application of harmless error rules to constitutional error . . ." (Respondent's brief at page 105). Whatever surface appeal this analogy may have quickly evaporates upon analysis. The factors relevant in deciding whether a given rule should

[4] The State also says that the record does not show that any of the statements were made after October 12, 1964 (Respondent's brief at page 54)—the day on which the formal complaint was filed and the arraignment held. But nor does it show that the statements suddenly stopped on that day, three days before Miss Fisk left Petitioner's cell. Indeed, the record strongly suggests that the statements continued at least until October 14, 1964 since Peggy Fisk "prepared her report as to her conversations with Petitioner on October 12, 1964 *and partly on October 14, 1964.*" (Respondent's supplemental opposing brief at page 3). In any event, the burden should be on the State to establish that the statements suddenly stopped, and the burden cannot be satisfied by what the record does not show. Moreover, even if the statements were completed before formal complaint and arraignment—which Petitioner by no means concedes—it should make no difference, since Petitioner had been arrested, booked and imprisoned prior to any of the statements.

be applied retrospectively are quite different from those relevant in deciding whether violation of the rule may be deemed harmless. In deciding on retrospectivity, the critical question is whether the purposes of the rule "would be advanced by making [it] retrospective." *Linkletter* v. *Walker*, 381 U.S. 618 (1965). Thus, rules which have as their primary purpose the deterrence of unlawful police conduct are applied prospectively, since misconduct which had "already occurred" prior to the announcement of the rule "will not be corrected by making the rule retrospective." *Id.* at 637. In deciding whether a violation of a given rule may be deemed *harmless*, on the other hand, the critical question is completely different: it is whether violations of the rule can be deemed so unimportant and insignificant that one can be confident that it did not affect the outcome of the trial. In answering this question, the purposes of the violated rule are irrelevant; only the impact of its violation on the outcome of the trial is important. This distinction may be illustrated by reference to confessions obtained in violation of the *Escobedo* and *Miranda* decisions. The "prime purpose of [the *Escobedo* and *Miranda*] rulings is to guarantee full effectuations of the privilege against the possibility of unreliable statements." *Johnson* v. *New Jersey*, 384 U.S. 719, at pages 729-730 (1966). Accordingly, these rulings will not be applied retrospectively. Yet the State concedes that the introduction of any unconstitutionally obtained confessions must be deemed prejudicial (Respondent's brief at pages 82-83). Nor does it matter whether the confession was obtained in violation of the case law on "coerced confessions" or the prophylactic rules of *Escobedo* and *Miranda*,[5] although that distinction is

[5] "The improper introduction of a confession which has been obtained in violation of the constitutional right to counsel trans-

determinative in deciding retrospectivity. *Johnson* v. *New Jersey*, 384 U.S. 719, at page 730. It seems clear therefore, that the considerations relevant to deciding whether a rule should be applied retrospectively are simply inapposite in deciding whether violation of that rule may be deemed harmless.

III.

Respondent Is Wrong in Stating That Petitioner Waived Her Federal Constitutional Claims.

The State renews its argument that Petitioner waived her federal constitutional claims by failing to renew her objection to Miss Fisk's testimony in the presence of the jury. Petitioner has responded to this argument at length in her petition for certiorari (at pages 7-13) and in her reply brief on certiorari (at pages 3-5). The Court is respectfully referred to these discussions. It is only necessary here to emphasize two points: (1) Petitioner's trial counsel did specifically object, on federal constitutional grounds, to the introduction of Miss Fisk's testimony (R. 1009); and (2) he specifically objected to the trial judge's ruling that the objection must be renewed in the presence of the jury (R. 1015).[6] If it were true, as the State claims, that Peti-

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gresses the protection of due process no less than the illegal introduction of a confession which had been coerced and Courts cannot inquire into the prejudicial nature of the introduction of an illegally obtained confession for the reasons stated in *People* v. *Parham*, 60 Cal. 2d 378, 385 (1963)." (Respondent's brief at pages 83-84).

[6] The completely justifiable reason for trial counsel's unwillingness to renew the objections in the presence of the jury, is fully explained in the Petition for Certiorari at page 12, to which the Court is referred.

tioner's counsel wanted Peggy Fisk's testimony to be included rather than excluded, then why did he specifically object to its introduction?

IV.

Respondent Is Wrong in Arguing That the Introduction of Peggy Fisk's Testimony Was Not Prejudicial.

Respondent spends many pages attempting to show that the introduction of Peggy Fisk's testimony was not prejudicial. Any fair reading of the record belies such a conclusion. Peggy's brief, but dramatic, testimony contained: (1) a specific and critical contradiction of Petitioner's testimony; (2) an admission calculated to enrage the jury against Petitioner; (3) an indication of feelings by Petitioner more consistent with guilt than innocence; and (4) a clear statement of possible motive for the alleged crime.[7]

The contradiction was that in her testimony Petitioner specifically denied loving Mr. Hayton after her husband's death (Appendix pages 102-103); yet Peggy Fisk testified that Petitioner admitted that she "still loves him" at the time of jail cell "conversation" (Appendix at pages 56-57). Any reasonable juror would be enraged by the spectre of a woman continuing to love another man after her husband's accidental death. Moreover, such a feeling would be far more likely to exist if Petitioner had murdered her husband than if he had died accidentally. Finally, and most importantly, Peggy Fisk's testimony must have been understood, in the context in which it was given, to suggest not

[7] Even the State concedes this. It describes the testimony as "a statement of the fact that she had a motive to murder her husband. . . ." (Respondent's brief at page 98).

only that Petitioner continued to *love* Mr. Hayton up to and after her husband's death; but that she continued to *want him to come to her.* And this, as the State concedes, was the critical and disputed issue at the trial (Respondent's brief at page 98). This is surely the way the prosecutor told the jury to understand it. In his closing argument he said:

> "She testified that she loved Hayton; that she wanted to marry him. She testified that her love for him died the same time her husband died. I'm not sure what that would have to do with it. At any rate, that's her testimony. But that's not what she told the girl up in jail. She told the girl up in the jail that she still loved Hayton, *felt that he would come to her.*" (Emphasis added.) (Appendix at page 105)

No court could be satisfied, in the context of this "close" case,[8] that there was no "reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut,* 375 U.S. at pages 86-87. Accordingly, reversal is required.[9]

Respectfully submitted,[10]

F. Lee Bailey
Counsel for Petitioner

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[8] See *Chapman* v. *California,* 386 U.S. 18 at page 23 (1967). In this case, the jury deliberated for more than three days, and the Court of Appeal stated that this case of "circumstantial evidence . . . was bitterly contested" and that "much of the evidence was conflicting." 53 Cal. Rptr. at page 727.

[9] If this Court chooses not to review the evidence in this case, it should—as Petitioner argued in her brief (at page 33)—"vacate and remand for reconsideration in light of *Chapman* v. *California,*

(*footnote 10 on following page*)

supra, which was decided after the last action of the California courts in this case, and which conclusively establishes that the District Court of Appeals in deciding that the introduction of Peggy Fisk's testimony was harmless error, was applying an erroneous constitutional standard." In that brief, Petitioner called the Court's attention to a number of cases which were reversed by the California courts after this Court remanded them for reconsideration in light of *Chapman* v. *California*, 386 U.S. 18 (1967). Since the filing of the brief, Petitioner has learned of other such cases: *People* v. *James Rowald Ricks*, 2nd Crim. 8216 (Second Appellate District); and *People* v. *Kenneth Reynolds Wheaton*, 2d Crim. 9915 (Second Appellate District). Accordingly, even if this Court rejects petitioner's argument against extending the harmless error rule to inculpatory admissions, it should not affirm petitioner's conviction without affording the California courts an opportunity to decide whether the error in this case was prejudicial under *Chapman* v. *California*.

[10] In her petition for certiorari, petitioner asked this Court to review five questions. Among them was the following:

> IV. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS UNCONSTITUTIONAL FOR A PROSECUTOR, WHO DOES NOT INTEND TO SEEK THE DEATH PENALTY FROM THE JURY, TO DISQUALIFY FOR CAUSE THOSE JURORS WHO HAVE CONSCIENTIOUS SCRUPLES AGAINST IMPOSING THE DEATH PENALTY.

This Court limited its grant of certiorari, however, to the first two questions, and petitioner has, in her brief, addressed herself only to them. This Court has now granted certiorari in two cases raising the issue of the death qualified jury. *Witherspoon* v. *Illinois*, #1015; *Bumper* v. *North Carolina*, #1016. Petitioner respectfully reminds the Court that this issue was properly raised and preserved in her case as well. If this Court sees fit, therefore, it may, if it holds the death qualified jury unconstitutional, reverse petitioner's conviction on that ground. Counsel is, of course, prepared to brief and/or argue this issue if invited to do so by the Court.